IN THE SUPREME COURT OF THE UNITED STATES

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JASON PEPPER, :

Petitioner : No. 09-6822

v. :

UNITED STATES :

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Washington, D.C.

Monday, December 6, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

ALFREDO PARRISH, ESQ., Des Moines, Iowa; Tallahassee, Florida; on behalf of Petitioner.

ROY W. McLEESE, III, ESQ., Acting Deputy Solicitor General, Department of Justice, Washington, D.C.; for Respondent, in support of Petitioner.

ADAM G. CIONGOLI, ESQ., Washington, D.C.; for amicus curiae, in support of the judgment below.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 09-6822, Pepper v. United States.

Mr. Parrish.

ORAL ARGUMENT OF ALFREDO PARRISH

ON BEHALF OF THE PETITIONER

MR. PARRISH: Mr. Chief Justice, and may it please the Court:

Having successfully completed drug treatment in prison, and having come home to succeed as a college student, valued employee, and family man, Jason Pepper presents to this Court two questions: Whether post-sentencing rehabilitation is a permissible basis for a downward variance from the sentencing guidelines at resentencing, and whether the district court judge in Pepper's resentencing was bound by the law of the case doctrine in its 5K departure ruling absent new facts, changes in the controlling law, or to avoid a manifest injustice.

Post-sentencing rehabilitation has traditionally been a relevant factor for judges to consider and is now a permissible ground for a non-guideline sentence. 3553(a) and 3661 are the

authorities permitting post-sentencing rehabilitation as a consideration for variance.

CHIEF JUSTICE ROBERTS: Counsel, I think you -- I think you have got a difficult job navigating between your two issues. It seems on the first one, the 40 percent to 20 percent, you are saying: Look, you've got to stick with what you did before; and when it gets to the post-sentencing consideration, you are saying: Well, we can -- all bets are off, we can start -- start anew; we can look at things that have happened since.

Is there a way you reconcile that -- those -- that tension?

MR. PARRISH: They are like apples and oranges. The law of the case doctrine is what you refer to as a matter that is left in the district court. The other issue of the -- whether or not the individual qualifies for downward variance is a completely separate issue. The law of the case remains with the district court judge.

In the other issue that we have, it's whether or not he's entitled to a downward variance based upon the book of remedies. So they are not, in fact, the same issues. And there is no tension --

JUSTICE GINSBURG: If the law of the case -- if the law in the case is left to the district court,

then the district court can say, well, the law of the case, that's what that other judge said, but it was a question of what's a reasonable time, and I'm -- I appraise it differently.

The -- the judgment has been vacated, the sentence has been vacated, so how does the law of the case survive? I mean, is -- the judgment is no longer --

MR. PARRISH: The law of the case survives on a couple of basic principles. One, there has to be new facts that the district court judge heard; there has to be a change of controlling law; and there has to be a reason to avoid a manifest justice.

If you go back to the 5K, one departure that the first judge made the decision on, that law -- that was law of the case. That percentage followed Mr. Pepper straight through the process. That's a totally separate ruling from any of the other factors in this case that relate to his downward variance.

JUSTICE GINSBURG: Can a district judge say, later on in the process: I made a ruling earlier in the case; I have since done a lot of research, and I now think that that ruling was wrong?

MR. PARRISH: Absolutely, they could do that. The circumstances would be, did they see new

facts? Was there a change of controlling law? The reason we do this is because we want to have confidence in that decision to make sure litigants don't go judge shopping.

So that's part of the reason this law of the case doctrine is in there. Even in Judge Posner's Second Circuit decision we cite in our brief, you defer to the first judge. But any time a judge can reconsider, there is no problem with that.

The law of the case in the 5K departure, when the first district judge heard substantial evidence with regard to the issue of cooperation, and that's what he did. When the next judge heard it, she heard no new facts, no change in controlling law, and absolutely heard no evidence with regard to --

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: That's kind of a fortuitous situation, then. You are sort of saying if you end up with the same judge, she can reconsider her own prior determination. But if you, for whatever reason, the death of the first judge, you're in a different judge; she's bound by what went before. That doesn't seem right.

MR. PARRISH: Well, that's an excellent example -- bound by -- but have you had to look at the

law of the case and make a decision whether or not new facts came in, there was a change in controlling law. Otherwise, you are still stuck as law of the case with that particular information. If new facts came in --

JUSTICE SCALIA: Even with the original judge?

MR. PARRISH: Even with the original judge. Absolutely, Justice Scalia.

JUSTICE SCALIA: Unless there are new facts or some -- some new --

MR. PARRISH: New facts, a change in controlling law, or other factors. It's a basic concept, and that's why a lot of cases are not floating around about that. Plus the government --

JUSTICE SOTOMAYOR: Counsel, I'm -- I'm a little confused.

MR. PARRISH: Sure.

JUSTICE SOTOMAYOR: I thought that the entire premise of Booker was that judges should have full discretion under 3553 to balance the factors that are required by the statute to be balanced and to come to what they believe is the appropriate sentence.

If we impose, in a resentencing, in a remand order that has vacated a prior sentence, a limitation on that power, don't we in turn do exactly what you are

arguing in your first half of your appeal, which is unconstitutionally tie the hands of the judge? I think that is what Justice -- the Chief Justice was getting to in his first question.

MR. PARRISH: Absolutely. That's why they are apples and oranges. If you go to the Booker decision with regard to Mr. Pepper -- and Mr. Pepper's decision is under the remedial remedy that we are asking that you would impose in that case -- Mr. Pepper's case is still on direct appeal.

As a matter of fact, if the restrictions placed upon 3742 (g)(2), if they remain, Mr. Booker would not have gotten the advantage of the remedial ruling in the case. Actually, he was entitled to it as part of the Sixth Amendment.

JUSTICE SOTOMAYOR: So why isn't a new sentence just that: A new sentence? And the judge, whoever the judge is, can do what they are supposed to do, which is to look at all of the factors and weigh them as that judge believes is appropriate, assuming the remand order is not a limited order.

MR. PARRISH: They can look at all of the facts, if there are new facts presented. The difference is, in the law of the case, there were no new facts. In this case, there were new facts to consider, which would

be part of the post-sentencing rehabilitation. In that issue, the Eighth Circuit rule that prohibited this was not even part of the 3742(g)(2) statute.

JUSTICE SCALIA: Yes, but one -- one of the new facts that -- that is before a judge on remand is that part of the basis for his decision has been eliminated. He -- he gave additional time because of a certain factor, and the court of appeals says: Oh, no, you can't look at that factor. And then he looks at the whole thing and says: Gee, without that factor this guy is getting off scot-free.

You mean he cannot -- he cannot readjust his other discretionary judgments in light of the fact that this additional factor doesn't exist? That seems rather -- I don't -- counterintuitive, I guess.

MR. PARRISH: Well -- well, Justice Scalia, under the -- each that is presented to the court, if you mix the law of the case doctrine with the 3742 problem, it creates a problem in analysis. That's why they have to be analyzed separately.

A judge can look at new facts, even under the remand statute, now that they are restricted to the facts that were part of the first case. That's what 3742(g)(2) does. It makes the guidelines sentences mandatory on remand. That's the problem with it.

If they become mandatory on remand, the problem is that nobody gets the advantage of the Booker remedial ruling of it directly, and all sentences on remand are mandatory. Even in the Booker decision, you make it -- in which Mr. Pepper was a recipient of, because his case was going on at the time -- he did not ever get the benefit of the Booker decision; when it was sent back, he never did. Mr. Booker, under 3742(g)(2), never would have gotten that advantage.

And there were several other factors that were coming into play where people would not get an advantage of the Booker ruling.

JUSTICE GINSBURG: What do you do with 3742(g)(2)?

MR. PARRISH: You excise it. You discussed it in the Booker decision. And in the Booker decision, you indicated, Justice Ginsburg, that you exercised two of the other -- 3553(b), you also exercise -- excised 3742(e), which made the sentences on remand mandatory.

In this case, 3742(g)(2)(A) and (B) were left open. And what happens then, the district court judge has to come back. Once they look at the decision, they are bound within those original facts. They can't go outside of those facts to decide something different or to permit a variance.

The Eighth Circuit didn't use that rule. What we are suggesting is that you excise that rule. You excise 3742(g)(2) and you excise (A) and (B) of that section.

JUSTICE ALITO: Would it be consistent with Booker for Congress to pass a statute that says the following: When a judge initially imposes a sentence, the judge must specify all of the factors that the judge thinks are relevant to that sentence, whether it's going to be a sentence within the guidelines or a sentence that is outside of the guidelines, and if there is then a remand, the judge may impose a sentence based on the factors that were listed at the initial sentencing but not based on any of the other factors?

MR. PARRISH: Justice Alito, Congress could do that. Unfortunately, that's not what they did in this case. But 3742, which came down as part of the PROTECT Act, in that case, Booker came after that. So consequently, 3742(g)(2) is problematic.

JUSTICE ALITO: Isn't that exactly what 3742(g)(2) does?

MR. PARRISH: It does not.

JUSTICE ALITO: It says under 3553(c), the sentencing judge is supposed to explain the factors that justify the sentence that is imposed. And that would --

that means explain a sentence outside of the guidelines, and also explain why the judge chooses a particular sentence within the guidelines range.

We have -- 3742(g)(2) says that when there is a remand, the judge may take into account all the factors that were mentioned the first time, but not the other factors.

MR. PARRISH: Well, Justice Alito, let me give you an example. What if they didn't state the reasons and you go up on the variance from the district court decision saying you didn't get the stated reasons? The appellate court then sends that decision back and the judge is then bound by those facts. And if they didn't find all the facts, suppose again they went up on a presumption that the guidelines were, in fact, reasonable. In that instance, you wouldn't get anything for the judge to work from.

And absolutely, they work from facts now within the guidelines. You take the Stapleton case that is in the Eighth Circuit that's cited in our brief. They will increase the guidelines within the guidelines on new facts, but you can't take those same new facts and then use them to assist your clients under 3553, which goes against all of the things --

JUSTICE GINSBURG: Is the sentencing -- is

the sentencing commission -- it still has that guideline that you can -- you can depart -- you can lower within the guidelines, but not beyond it?

MR. PARRISH: Correct. You mean under the post-sentencing rehabilitation?

JUSTICE GINSBURG: Yes.

MR. PARRISH: They have it as a policy bar, but the Kimbrough decision really indicates that the courts are not supposed to use that as only one factor. You are supposed to look at all the rest of the factors. And as a matter of fact --

JUSTICE GINSBURG: But as far as the sentencing commission itself is concerned, its position is still that post-conviction behavior does not warrant a below-the-guideline sentence?

MR. PARRISH: Correct. And it comes right out of the Eighth Circuit, which was not based upon empirical data like a lot of these other issues are based on that they create as policy matters. But under Kimbrough, you said policy matters are only one consideration. You must, in fact, look at all the other factors.

You also said it in Reeder, too. You are not bound by just one of the factors. The court has to look at everything in order to be able to make a

decision to be consistent with all the other decisions that you have written in this area.

JUSTICE ALITO: Suppose that Mr. Pepper had an identical twin, and suppose that Mr. Pepper and his twin engaged in the same criminal conduct. They are charged with the same offenses; they are tried together; they are convicted of exactly the same offenses; they are sentenced on the same day.

Between sentencing and the time of the appeal, they rehabilitate themselves in exactly the same way. The twin sentence is affirmed on appeal, and Pepper's sentence is overturned and he gets a remand for a new sentence.

Why is it justified for Mr. Pepper to get credit for post-sentencing rehabilitation, but his twin does not?

MR. PARRISH: Well, in that instance, the question is: Do guidelines accept the fact of some disparity? And there is what's called warranted disparity. Mr. Pepper did exactly everything that we want a person convicted of a crime to do. He exceeded it. And in that instance, if his case comes back down, it doesn't fall on any concept of unwarranted disparity. There is a difference. There is a difference with every individual --

JUSTICE ALITO: His twin did everything that was expected of him, too, but he doesn't get any credit for the rehabilitation. He just gets good time credit for good conduct while he's incarcerated.

MR. PARRISH: But our guidelines in our laws make situations where people who are unique and who, in fact, exceed, don't fall into a separate category of being unwarranted disparity.

The emphasis is on "unwarranted." There is some disparity, and if a person is unique and that person does, in fact, under 3353 factors, meet all of the things that require us to look at a person as an individual, that's what we want in our society. And that's what your cases -- 3553, 3661 -- that's what they indicate. You look at the person as an individual.

And true enough, some disparity will be there, but it's a warranted disparity. And it's something that the court can look at, along with all the --

CHIEF JUSTICE ROBERTS: Well, it's -- it's warranted that the one get the benefit and it's unwarranted that the other does not. I mean, the departure in the case of the one who gets reconsideration is warranted, but that doesn't mean that the disparity is warranted.

MR. PARRISH: Well, it would be on a variance and, as you know, under the Gall decision, Chief Justice Roberts, you can look at all of the other factors. In the departure theory, it's a little different. They are little bit narrower, given it's more restrictive, and there are other factors that come into play.

Under the variance theory, you have to look at the entire individual. So if that individual can demonstrate that they have made improvements -- not just gone to drug classes, but completed them successfully; not just worked as an employee, but also excelled and got on a management track; not just went to college, but got on the dean's list and made straight A's -- those are the factors that we want these individuals to have.

And that's why 3553(a) allows us that latitude, and 3661, which is a long history based upon no limitation being placed upon the district court judge, these are the things we want these people to have --

JUSTICE BREYER: Is there a guideline that says that there cannot be a departure for rehabilitation after an initial sentencing that is set aside?

MR. PARRISH: It's not a guideline. There's a policy out of the --

JUSTICE BREYER: No. So there is no guideline. So as far as the answer to Justice Ginsburg -- what I thought her question was, that is -- the guidelines initially said that the commission has the power to limit departures, but it doesn't do it, except for race and gender --

MR. PARRISH: And age, and factors like -- that's absolutely right.

JUSTICE BREYER: -- and age. That's right. So under the guidelines, a judge can depart for any reason except those few forbidden things, which I think are properly --

MR. PARRISH: And that's the grammar, variance. That's correct.

JUSTICE BREYER: And that's still the law. That's still the law.

MR. PARRISH: Correct. That's correct.

JUSTICE BREYER: So it's the circuits that have made this thing up?

MR. PARRISH: The Eighth Circuit created it out of whole cloth following the Sims case. It was a policy that was actually adopted by the guidelines in the year 2000. Prior to that, there were about 8 circuits that allowed post-sentencing rehabilitation. Now even under the new analysis, there are about 6

circuits --

JUSTICE BREYER: Well, what would the source of law be to make up such a thing? I mean, what is the source -- what law gives the right to the -- to a -- a circuit, to make that up, would have to say it was an unreasonable thing to do.

Now, I guess you could have an argument either way on that, but it doesn't strike me off the bat as unreasonable, where a person has rehabilitated himself, to take that into account.

MR. PARRISH: I would agree with you.

JUSTICE BREYER: And we would have the power to say that.

MR. PARRISH: Absolutely.

JUSTICE SCALIA: What about 3742(g)(2)? That's what we're arguing about.

MR. PARRISH: It is what we are arguing about, not about the policy, because they didn't even use that, Justice Scalia, in making their decision.

I would like to reserve my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

MR. PARRISH: Thank you so much.

CHIEF JUSTICE ROBERTS: Mr. McLeese.

ORAL ARGUMENT BY ROY W. McLEESE, III,

ON BEHALF OF THE RESPONDENT, IN SUPPORT OF THE

PETITIONER

MR. McLEESE: Mr. Chief Justice, and may it please the Court:

There is no valid basis to categorically bar variances under the -- variances from the guidelines based on post-sentencing rehabilitation. That is true for four primary reasons.

First, it's undisputed that post-sentencing rehabilitation is logically irrelevant to statutory sentencing factors in 3553(a), including the need for deterrents and the need to protect the safety of the community.

Second, the guidelines themselves authorize consideration of presentencing rehabilitation to a limited extent, because it's permissible under the guidelines to consider presentencing rehabilitation in selecting a sentence with inside the guideline range.

What the guidelines do prohibit, and there is a provision in the guidelines that does prohibit the -- a departure from the guidelines based on post-sentencing rehabilitation. The guidelines prohibit that, but the judgment of the commission about how much weight that factor can be given after Booker in an advisory guideline regime is advisory rather than mandatory.

Third --

JUSTICE BREYER: Which guideline? What guideline prohibits that?

MR. McLEESE: 5K2.19.

And third, contrary to the suggestion of the amicus, there is no general principle in our law that at a resentencing, new information may not be considered. To the contrary, the consistent assumption of the law is that at a resentencing, you take the defendant as you find him as of the time of resentencing. That is clear from this Court's decisions in Pierce and in Wasman. It is clear from the large body of cases from the lower courts cited in Petitioner's brief at pages 42 through 44.

That's the way the guidelines operate, so there is no general principle that you cannot consider new information.

Now, it's true, as Justice Alito's question suggested earlier, that that can result in differences of opportunity, where one defendant will have an opportunity for a resentence and new information will be considered as to that defendant; a similarly situated defendant will not get a resentencing.

But that opportunity is sometimes referred to as "luck." First, can be good luck or bad luck, and

to take the example Justice Alito gave of two twins, if you have an example of two defendants who are twins who are each convicted of an offense -- let's say burglary -- and they are given very lenient sentences, and because the judge looks at their record at the time and determines that they are sympathetic. They are don't have a prior criminal record.

One of them's conviction, you know, has no claims of legal error relative to his conviction; he gets no resentencing. The other gets a resentencing. By the time of resentencing, it has become clear that that defendant had previously committed several murders, and he's -- you know, murdered -- has also committed a subsequent murder.

There is no question that at that resentencing, that information would be considered. There is no question there would be a disparity, and it would be true even if, let's say, those earlier murders had been committed by both of the twins together.

JUSTICE ALITO: Well, isn't there a difference between evidence that -- evidence of conduct that occurred prior to the initial sentencing, but wasn't known at the time of the initial sentencing, and evidence of conduct that occurs between the initial sentencing and the resentencing?

MR. McLEESE: There could be, but again -- maybe going too far with the example of the two twins, if the two twins, while they were serving -- let's say they got lenient sentences, but not probation. While they were serving in jail together, they murdered a correctional officer. If one of the defendants does not get a resentencing, if one of those twins does not, there will be no opportunity for that to be taken into account.

JUSTICE SCALIA: And what's your --

MR. MCLEESE: His brother gets a resentencing --

JUSTICE ALITO: Maybe it's all or nothing.

JUSTICE SCALIA: It is.

JUSTICE ALITO: Maybe it works both ways, that the defendant doesn't get the credit for good conduct between sentencing and resentencing, but also doesn't get punished at resentencing for unproven conduct that occurs between the first sentence and the next -- and the second sentence.

MR. McLEESE: That's a possible rule of law, but my point was that's not the rule of law we've ever had. That's not the -- and I should say, nor is it the rule of law that is created by 3742(g)(2), because 3742(g)(2) is not a rule about consideration of new

evidence. It's an anti-departure provision. It permits consideration of new evidence, and it permits these kinds of -- if you -- disparities, whether warranted or not, because it permits consideration of new evidence in determining the guidelines' range, new evidence about loss amounts or -- or whatever. It permits consideration of new evidence as it might relate to upward adjustments or downward adjustments, as it might relate to criminal history. What it forbids is new variances or departures.

So 37422(g)(2) does not implement some general policy with respect to new evidence, nor, should I say, to the guidelines, because as I said, the guidelines permit consideration of post-sentence rehabilitation in setting a guideline range. They reflect a judgment not about the disparities always trumping other considerations, including accuracy in sentencing, but only how much weight that those disparities --

JUSTICE SCALIA: Is that your fourth point? I am all on pins and needles waiting for your fourth point.

MR. McLEESE: No. Apologies. The fourth point is simply that 3742(g)(2), if valid, would foreclose consideration of post-sentencing

rehabilitation, but after Booker it is not valid, and --

JUSTICE KENNEDY: If Congress reenacted 3742(g)(2) tomorrow, would it be valid?

MR. McLEESE: It would be invalid. It would be invalid because it would be -- as applied in certain circumstances, it would unconstitutionally constrain the authority of judges at resentencings and also be -- with Booker.

JUSTICE BREYER: Why? Why? Because look, the -- that is not this case. This case, they never had a chance to consider whether Booker applies or not, so this is, I think, a special case.

But think of 3742(g) in general. It's pretty easy to read that section as applied to instances where a judge, the initial sentencing judge, has decided on his own volition to apply the guidelines rather than not to apply them.

Now, in such a case, he sentences the individual. There's then an appeal, and the appeal he is reversed on. What in the Constitution says there has to be a second chance to decide whether the guidelines or something else should apply? What in Apprendi says that? What in any of these cases says that?

This is an Apprendi problem. As you know, I've dissented throughout; I think this is bad policy,

but -- I've disagreed with everything, but forget that fact, important though it is.

(Laughter.)

JUSTICE BREYER: But the -- the thing that's worrying me about -- and I don't think -- I agree with you on policy, but what I'm -- what I'm having trouble with is: Is it better under the law to say yes, we can interpret 3742(g) so it can be constitutional, and then if in some cases it violates Apprendi, let the Court say that in this case it violates Apprendi.

But it just isn't clear to me, which is why I left it alone the first time. It's not clear. So -- so as to when it is, when it isn't constitutional.

You got my whole question there?

MR. McLEESE: I do.

JUSTICE BREYER: And I would appreciate as much answer as can give me.

MR. McLEESE: Take an example that is in the briefs. If at an original sentencing a judge determines the guideline range and ends up calculating it to be relatively low -- 57 to 73 months, which probably aren't even exact numbers -- and determines that that's an appropriate sentence, and although the defendant is urging various factors as a basis for downward -- for variance from the guidelines, the judge determines that

there is no reason to vary because this is a sentence that seems reasonable.

So although those reasons might well be persuasive in some contexts, they aren't given the range now. The government takes an appeal and argues to the court of appeals: In fact, the judge was wrong; the guideline range is much higher. And so on remand at the resentencing, the judge makes some factual determinations, not found by the jury or admitted by the defendant, which increase the guideline range under the new advice from the court of appeals to a guideline range of 121 to 151 months.

JUSTICE BREYER: You think that violates Apprendi?

MR. McLEESE: Well, if the judge then says: I would like to vary from the guidelines; I am locked under the guidelines to a 121-month sentence, and I have -- I didn't -- it's true I didn't vary before on these grounds, but that's because the sentence didn't author -- didn't warrant -- because of relative lack of severity, did not warrant a variance, I think that the -- the logic of Apprendi and Booker would foreclose constraining resentencings in that way.

JUSTICE ALITO: I'm --

MR. MCLEESE: And I think that's an answer.

If I could just --

JUSTICE ALITO: Yes.

MR. MCLEESE: I think that's an answer to the question that you asked earlier, which is, I think, if Congress enacted a statute which categorically said that whatever happens at the original sentencing, the judge has to list any reason that the judge is relying for a downward variance or departure, and then cabins the judge on a remand, that in certain contexts that would be inconsistent with this Court's line of cases from Apprendi through Booker.

JUSTICE ALITO: Well, under 3553(c), the court is supposed to explain the reasons for the sentence, even if it is within the guidelines; isn't that right?

MR. McLEESE: Yes.

JUSTICE ALITO: And so if the court is deciding whether the sentence should be 57 months or 63 months, whatever the figures were that you gave. The court thinks that some factor -- let's say age is significant -- the court should say, I am sentencing the defendant to 57 as opposed to 63 because of the defendant's advanced age or young age or whatever it is.

Now on appeal, the -- the court of appeals says the guidelines sentence was improperly calculated,

it should be -- the real range is 120 to 125 months, remand. Now if the court wants to grant a departure or a variance based on age, the court has mentioned age previously as a relevant factor, and it can do that. But if age was not -- if age was not relevant to the determination of where within the guidelines this sentence should be set, why is it -- why does the Constitution require that age be a relevant factor, a factor that's open to the judge on resentencing?

MR. McLEESE: Well --

JUSTICE ALITO: It's just the notice provision. It's not -- it's not something that substantively limits what the court can do.

MR. McLEESE: To clarify, a judge is required to state in open court orally the reasons for a sentence inside the guideline range, only if the range is sufficiently large, and the written statement of reasons does not require -- the reasons for selecting a sentence within the guideline range are not required to be in the written statements of reasons. The written statement of reasons applies only to grounds outside the -- the guidelines. And to -- from a practical perspective it would be extremely difficult to expect sentencing judges to list every conditionally or contingently relevant fact depending on whatever

sentence ultimately comes back on remand, that might be relevant to a reason to depart from a range that the judge is not contemplating at the time of the sentencing.

Ut I should say also that if --the answer to this question of better Congress could reenact 3742(g)(2) after Booker, and it would be constitutional or not constitutional as applied in certain settings is not essential to our point, because the appeal provisions that were excised in Booker were not determined by the Court, they were not excised because the Court determined they would be independently constitutional.

The remedial component of the Booker opinion was focused on the question of, having found a constitutional violation, what then do we do to remedy it, and what the Court said was the way we will remedy this is that we will make the guidelines advisory rather than mandatory.

JUSTICE BREYER: The answer to this case is, I don't think, too hard. You say it's at least questionable enough, 42(g) you could say, at least questionable enough that it is the same box as the ones that were excised.

MR .McLEESE: And --

JUSTICE BREYER: And then there has not been focus in the district court on what the district court would want to do, assuming he is free to apply the guidelines or not, on the remand decision that that judge has never made.

MR. McLEESE: Yes, and to elaborate on that --

JUSTICE BREYER: Is that right?

MR. McLEESE: Just -- just by its terms, section 3742(g)(2) is inconsistent with the remedial rule announced in Booker, which was that the guidelines would be advisory rather than --

JUSTICE BREYER: They didn't say -- forget that argument. What I was about --

MR. McLEESE: But more specifically --

JUSTICE BREYER: I do have another point I would like to get out, as long as I have this opportunity. It seems to me there is a considerable confusion, perhaps, only from my point of view, but this word "variance" -- I mean why is it felt necessary to use the word "variance"? If it is true, and it's not totally true, but if it's true the judge -- you can apply the guideline, apply it. Now, the guidelines themselves gives you the right to depart in every single case but, for example, a handful of factors such as

race, where you really shouldn't change the thing just because of race. So what is the need for the variance?

Now, maybe this 5K9. whatever that is, maybe there are a handful in which there is a need, and maybe this is an example of it. But are there a lot, many, what -- can you just talk a little bit about it.

MR. McLEESE: It's two points with respect to that. One of which is, this is a provision where the -- the commission has specifically said it is not lawful to depart on this basis, though it is permissible, again, to sentence within the range --

JUSTICE BREYER: But it's just a policy statement. Does it enjoy the same status of law?

MR. McLEESE: Correct. Yes, they are treated -- in the era when the guidelines were treated as mandatory, they were treated as guidelines in return. There are other guidelines provisions about departures which either foreclose other bases or which will say they were not usually or ordinarily a basis for departure.

JUSTICE BREYER: Oh, I see.

MR. McLEESE: And, so, there still is litigation in a post mandatory guideline system about whether it is a correct application of the guidelines to on this basis.

CHIEF JUSTICE ROBERTS: Counsel, perhaps before your time is up, you would like to address the first question?

MR. McLEESE: Yes. With respect to the law of the case issue, as it has been framed by the -- the -- the briefs by Petitioner on the merits in this Court, it is an extremely narrow issue; and that is, taking as a given that the Eighth Circuit had authority to order de novo resentencing and, in fact, it did order de novo resentencing was at that resentencing, the district court -- the resentencing district court judge bound by the earlier judge's discretionary determination that the substantial assistance provided by defendant Pepper justified a 40 percent reduction. And to ask that question is to answer it in the sense that the phrase "de novo" means anew or afresh. And the point --

CHIEF JUSTICE ROBERTS: But it has nothing -- but what if the appeal had nothing to do with the issue at all? I'm thinking in -- the analogy in a civil context, so you have two totally unrelated issues. If you appeal issue B and that is what the fight is about, and you reverse and send back, it would at least be unusual for judge to say, well, and by the way, I'm coming out the other way on issue A.

MR. McLEESE: And that is true in the civil

setting. Courts have taken the view that sentencing is different because sentencing is a relatively discreet proceeding where there are a number of interconnected determinations, a lot of them discretionary, based on the judge's assessment, a lot of them conditionally relevant to each other --

CHIEF JUSTICE ROBERTS: These are not interconnected, are they?

MR. McLEESE: Well, the amount of substantial assistance that is given in a particular case can easily be connected to antecedent determinations, including what the guidelines level is. Since judges often --

CHIEF JUSTICE ROBERTS: No, my point is that the level of assistance is not in any way connected to the post-sentencing conduct.

MR. McLEESE: These two issues are not interrelated, but I'm explaining the reason for of the doctrine in the sentencing setting. The greater willingness of courts of appeals to order de novo resentencing and say even though the particular issue on court of appeal does not directly open up the other issues that may have been determined at sentencing, judges in the -- courts of appeals in the sentencing context all agree they have authority to order de novo

resentencing where they think it's appropriate. And they tend to think it is more appropriate in the sentencing context than generally, because as I said --

CHIEF JUSTICE ROBERTS: Well, but why -- why does that matter when you are talking about two totally unrelated issues?

MR. McLEESE: Because also --

CHIEF JUSTICE ROBERTS: There is no reason to suppose that the court of appeals thinks there ought to be or any issue with respect to the question A when they focus solely on question B.

MR. McLEESE: I agree. But again, when the court of appeals orders de novo resentencing, that doesn't open up only substantial assistance. The point is, the judge is going to go through and as of the time of the resentencing, determinations on the situation as it existed at that time. So, it is possible and not at all unusual that issues that were not up in the court of appeals will come up on resentencing.

CHIEF JUSTICE ROBERTS: So, you are worried about the general rule, but you agree that none of these arguments make any sense in this case?

MR. McLEESE: I -- I agree that it would have been permissible for the court of appeals here to choose not direct a de novo resentencing that would have

been a permissible way to resolve the issue as well --

CHIEF JUSTICE ROBERTS: That would not interfere with the new judges or the judge's discretion across the board?

MR. McLEESE: I -- I --

CHIEF JUSTICE ROBERTS: I have never had to sentence someone, but it seems to me, particularly when you have a change in the judges, there is a very personal investment in what you do with the -- the defendant, and to say that, well, another judge looked at this factor, so your hands are tied in that respect is -- is a questionable result.

MR. McLEESE: I agree. And I should say that the issues that we are discussing are interesting ones, but they are not the law of the case issue that is being presented here. Because, in fact, the Eighth Circuit did order de novo resentencing, the defendant has never challenged the validity of their ordering de novo resentencing, so the only issue is what does it mean for the law of the case doctrine when de novo resentencing is ordered?

And on that question, it is very clear. In fact, not just the Eighth Circuit but every court of appeals that we are aware of to resolve that question has said that as the name suggests when the circuit

chooses, for whatever reasons, to order de novo resentencing, the -- the judge at resentencing is not bound by earlier determinations of the district court judge. And --

CHIEF JUSTICE ROBERTS: Is there reason to suppose when they say de novo resentencing, they are talking about the mistake that was made with respect to the issue B and not issue A?

MR. McLEESE: No, there is no reason to suppose that. But what there is reason to suppose --

CHIEF JUSTICE ROBERTS: Do they -- is it their practice in some cases to say we are sending this back for de novo sentencing, but only with respect to the issue that we addressed, or do they just normally throw it out and say start over, without any supposition that the district court would take a look again at something that wasn't before the court of appeals at all?

MR. McLEESE: Different circuits approach that somewhat differently, but all circuits have -- understand that they have authority to make individualized case determinations and they do. There are cases where --

CHIEF JUSTICE ROBERTS: Could they -- are you aware of any case where the Eighth Circuit has said,

we are sending this back for resentencing but only on the issue that we addressed on appeal?

MR. McLEESE: Yes. And the Eighth Circuit's opinions make clear that although they apply sort of a default presumption that there will be de novo resentencing, they make clear that they have authority to order limited resentencings. And they do that where in a particular case they think it is more efficient or more appropriate.

They explained in this case, by the way, with the with respect to the suggestion you made earlier, Mr. Chief Justice, that part of the reason they thought de novo resentencing was appropriate here is because they were reassigning the matter to a different judge, and therefore, I think for some of the reasons that you were suggesting, they felt de novo review was appropriate.

But again, on the narrow law of the case issue that is presented, there is no disagreement among the courts of appeals, and as the name suggests, if there is a de novo resentencing, the matter is de novo.

If I could for just a moment turn back to the post-sentence rehabilitation issue to make one last point, which is going one level deeper into the Booker remedy analysis again, even if there were some -- excuse

me.

CHIEF JUSTICE ROBERTS: Finish your sentence.

MR. McLEESE: All I was going to say was in excising the appeal provisions that were excised in Booker, the Court identified four reasons why those should be excised, and each one of them applies equally or more so with respect to the provision at issue here.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Ciongoli?

ORAL ARGUMENT OF ADAM G. CIONGOLI,

AS AMICUS CURIAE, SUPPORTING JUDGMENT BELOW

MR. CIONGOLI: Mr. Chief Justice, and may it please the Court:

Congress enacted 3742(g) for the purpose of stopping district courts from evading the mandate of the court of appeals on remanding sentencing cases by relying on grounds that they did not consider at the original sentence.

JUSTICE SOTOMAYOR: And as far as you are concerned, Justice Alito's question about post -- post-sentencing criminal conduct couldn't be considered by a court, either? Because it wasn't a factor mentioned in the original sentence, so you would apply the rule equally?

MR. CIONGOLI: I -- I would, Justice Sotomayor.

JUSTICE SOTOMAYOR: Is there any logic to that? I mean, I know that when I was a district court judge, routinely post sentencing criminal conduct would make me wonder whether this person really was worthy of a lower sentence or not, or of whatever largesse I may have given him or her in original sentence. What makes sense about that?

MR. CIONGOLI: Well, I think one thing that would make sense of it is there's a different mechanism. There is an opportunity for that to be reflected in a -- in a separate criminal prosecution and a -- and a sentencing for that conduct. When -- when the sentencing guidelines were created and when 3742(g) was passed, all of this was done against the backdrop of a sense that the sentencing guidelines were to focus on avoiding unwarranted disparities, but as the Court observed in Booker, sentencing similar -- similar sentences for similar crimes conducted in similar ways.

JUSTICE SOTOMAYOR: When this provision was passed, Congress was worried, I thought, about the situations where district court judges has -- were on appeal till -- you can't use this ground for departure, and often the court, because they thought the original

sentence they gave was fair, would then articulate another ground for departure that they hadn't earlier. But wouldn't that all go out the window with Booker? I mean, the presumption that drove Congress was that the guidelines were mandatory. Once Booker said they weren't, why should we be limiting Congress -- a judge's discretion at an issue or post hoc to giving what they believe is a reasonable sentence?

MR. CIONGOLI: Justice Sotomayor, I think the purpose of 3742(g) is to limit the ability of the district court to evade the mandate on remand in sentencing. And I think that purpose was valid before Booker, and I think it's actually even more important after Booker. If you are going, for example, to have meaningful opportunities for the Government to appeal. If a district court can impose a sentence that the court of appeals then finds substantively unreasonable, and on remand the district court can then consider grounds that didn't exist at the time of the original sentencing, and, in fact, couldn't have been considered by the court of appeals because the evidence didn't exist at the time the court of appeals reviewed it. And in this case it's uniquely in the hands of the defendant to create, then you are going to create essentially a procedural merry-go-round where a district court will impose a 24

month sentence, the Government will appeal, the court of appeals will think that is substantively unreasonable, it will be remanded to the district court and they will say, well, in the interim this person has rehabilitated them self, they have gotten a job and they've gone to school. The Government, and I'm imposing another 24 month sentence. These are not related to the facts of the case, but this is a different hypothetical. The Government will then appeal again and say this is ridiculous. The underlying conduct is extremely severe, 24 months is substantively unreasonable and they will appeal to the court of appeals. The court of appeals will say we agree it's substantively unreasonable and we will get a remand for resentencing. And the district court will say, well, not only has he gone to school and not only does he have a job, but he's gotten married and he has been promoted and he has been named employ of the year, so I am imposing a 24 month sentence again. And at some point the Government is going to say, I give up, because I could keep appealing, but what's the point, it appears --

JUSTICE KENNEDY: But there are two explanations for your hypothetical. One is there has been a real change that affects the judge.

The other is where you began, I thought you

were going, where the judge is evading the court of appeals. Those are two different things. One may happen, one may not.

MR. CIONGOLI: That's right, Justice Kennedy, and I think that both purposes are served by 3742(g). 3742(g) as both the Petitioner and the Government serves a constitutional purpose. What both the Petitioner and the Government object to is the way that it's drafted. It's not that Congress, they say, couldn't pass this, but that they couldn't pass it the way that it is passed because it makes essentially illegal references to the mandatory sentencing guidelines. That is a product of the fact that this statute was drafted before Booker and didn't have the benefit of knowing how Booker was going to come out. What the Court I think needs to decide is post Booker how it's going to deal with statutes like 3742(g), and there are others, which stand for an entirely constitutional and important purpose, but which necessarily, because of the time they were drafted, have references to or language that assumes the existence of a mandatory guidelines scheme.

JUSTICE SOTOMAYOR: How many of those statutes are left that the Court hasn't looked at?

MR. CIONGOLI: Well, I can think of at least

three problems that would result from the Court saying that any reference to a mandatory guidelines scheme creates -- creates essentially a facial invalidity if it's incapable of constitutional review.

JUSTICE SOTOMAYOR: Which are the three?

MR. CIONGOLI: Well, first of all, 3553(a) makes two references to 3742(g). So there's a question as how you would apply those if you strike 3742(g). I think that 3553(c), to the extent that it requires a written statement in the context of a departure, starts to raise questions. And as Justice Scalia points out in his dissent in Booker itself, there is a real question as to whether 3742(f) has any reason to exist after Booker.

JUSTICE BREYER: But all those, what you tend to do is take the parts that refer to the other statute and say they don't do anything. And does that ruin the provision its in, the answer I think normally is no, it doesn't ruin it at all. It makes sense. But this one is a tough one. I grant you that this one is a tough one. And my problem of course is I can think of a constitutional way of applying this, but it's a little far-fetched and the far-fetched one makes me think that it's unconstitutional in the far-fetched nature of it and I don't think it has a spillover. The far-fetched

one was the one that was brought out. Not far-fetched, but to say in those circumstances that it is constitutional, where they are going to apply a new guideline and they don't have the evidence. As much as I dissented in Apprendi, I think that one probably does violate Apprendi. And I think I have to stick up for that, don't I?

MR. CIONGOLI: Justice Breyer, if you are referring to the solicitor general's hypothetical of a case in which they miscalculate the guidelines and they don't announce their reasons otherwise, I actually think there is a way to avoid the problem depending on whether the point arises before or after this case. If it arises after this case, I think it will be very clear to the district court's that they need to be careful and thorough in articulating their reasons for reaching the sentence, which particularly in a post Booker world, I think, is a good thing.

JUSTICE SOTOMAYOR: Would that -- I mean -- we right now are receiving hundreds of petitions saying the court didn't sufficiently articulate its reasons. We're going to change the practice of the district court. I mean, dramatically. You think that's a good thing to do?

MR. CIONGOLI: I think having a district

court articulate it's reasons is a good thing. They are supposed to do that under Congressional statute now, 3553(c), they are supposed to do that in open court very clearly and in certain circumstances they are supposed to do it -- they are supposed to do it in writing.

JUSTICE BREYER: They can check a box, they can check a box and unless they are going to depart. Now, the parts that's not necessarily to deal with later, the part that's confusing me is where this word variance comes into. Because I think the word departure would normally, normally cover the matter. And then when it gets to the court of appeals, the court of appeals, whether they are inside the guideline or outside the guideline and have departed, reviews the matter for, you know, inside it had departed or outside, those situations. It says in Booker the standard is to review for reasonableness. But where does this variance business come in?

MR. CIONGOLI: I think in the context of 3742(g) that's one of the linguistic vestiges of the guidelines, which is that up until Irizarry the Court itself used the terms variance and departure interchangeably because a variance didn't exist prior to Booker. The Court obviously spoke to the question of whether or not it was going to equate a variance and a

departure in the context of rule 32(h) in Irizarry. I don't think actually that that distinction was essential to the holding in Irizarry and I think could be limited there. I think particularly where the court is trying to avoid invalidating a duly enacted statute, some flexibility in terms of interpreting departure in 3742(g)(2)(B) would be warranted and you would essentially say that to the extended that a court is varying or departing, that they would need to articulate the reasons.

JUSTICE GINSBURG: It's true then that in all of the briefings in Booker, 3742(g) was not mentioned by anybody?

MR. CIONGOLI: That's correct, Justice Ginsburg.

JUSTICE GINSBURG: So it was a question of the Court overlooking it. The Court didn't say anything one way or the other about it because it wasn't presented as one of the statutes that would have to be overruled?

MR. CIONGOLI: Justice Ginsburg, I think that obviously the Court is dealing very clearly with the constitutionality of it now. And I think that Congress had very good reasons for enacting it that continue to be valid. It's capable of constitutional

application, I think in the mine run of cases, and in particular in this case. There is no Sixth Amendment allegation in this case.

JUSTICE BREYER: The problem, to be very specific, is I think the following: The first sentencing, the judge applies the guideline. He says there was $300,000 stolen from the bank, I look it up over here and I get sentence X. On appeal the appellate court says you should have counted the securities as money taken. So it's 1,300,000. So go and apply guideline Y. He goes back and looks at Y, it's a very high number, and thinks given certain circumstances which make this case unusual, I want to depart downward.

Now, I would have thought that the judge's behavior in that second instance would have violated Apprendi, because that judge was either going to sentence even without the departure on the basis of him having taken some securities worth a million dollars which was not a fact that went to the jury. There it is. Or he has to throw aside the guideline.

But this statute says you can't throw aside the guidelines, and you can't depart for a reason that wasn't previously given. So this statute is -- is forcing him to sentence on the basis of a fact that was not found by a jury. I think that's the argument for

saying it violates Apprendi. And I -- I don't see why it doesn't.

MR. CIONGOLI: Justice Breyer, I -- I think that in -- in certain applications of this statute there will be problems. I -- I think that's unavoidable and I think it's an unavoidable consequence of having been drafted before Booker. The question is how the court is going to address that. Is the court going to read the statute flexibly? Is -- is it going to interpret it in a way that tries to avoid those circumstances, those constitutional problems? Or does it ultimately determine that it is -- it is essentially not capable of a saving construction.

I think it is capable of a saving construction; I think it is capable of a saving construction in a couple of ways that avoid most of the problems that have been articulated by -- by both Petitioner and government. The first, which actually Petitioner points out in his reply brief, is in 3742(g) itself, there is this language about "except that," that appears to limit the -- the ability of the district court to actually follow the mandate of the court of appeals.

I don't think that that can be read to limit the mandate in the court of appeals, nor do I think that

anyone is suggesting that 3742(g) changes the rule in Harper v. Virginia Department of -- of Taxation, the idea that -- that district courts obviously would have to give the benefit of intervening changes in -- in law in judicial decisions; and so Booker which has been used as an example, Booker on remand would likely have been entitled to a -- a resentencing, a resentencing based on factors that the district court judge could have considered at the time of the original sentencing, but now in light of Booker, basically a do-over. And for a -- for a small section of cases, I think that would work.

JUSTICE SCALIA: How? Would -- would you explain as concisely as you can, why you think that (g)(2) would be unconstitutional in -- in some limited category of cases, and how that can be avoided by what you call a flexible interpretation?

MR. CIONGOLI: Justice Scalia I think I said it would be problematic; I don't think I conceded that it would be unconstitutional.

JUSTICE SCALIA: All right.

MR. CIONGOLI: I think that -- I think that there are -- there are some circumstances where, by a strict read of -- of (g)(2), the court would be required to apply the guidelines, a guidelines range. And the

example that -- that the Solicitor General's office gave might be the best, which is where you have a circumstance where the district court has imposed a sentence within the guidelines range, has not given any other reason for a variance, the sentence is at the bottom of the range which may or may not indicate that they thought that the -- that the sentence should be at the low end; and then on a -- on a calculation there is a determination that the -- on appeal there is a determination that the calculation was incorrect; and on remand the district court says, I'm -- I'm bound by this new calculation, and I'm giving you a mandatory sentence.

I'm giving you -- I'm bound by the guidelines range because I didn't give any other reasons. I didn't give any other reasons under -- under (2)(A), and therefore I can only give you a guidelines sentence. And in those cases the guidelines would be mandatory. And under Booker I think there is -- there is a question as to whether a court can impose a mandatory sentence in any case after Booker.

JUSTICE SCALIA: Well, but -- I mean, why wouldn't you read that simply to have been overcome by the holding of Booker, that you apply -- that every judge has to apply 3553 factors and decide the ultimate

sentence on the basis of those factors? I mean, isn't that what Booker said, and why wouldn't you apply that to -- to (2)(A) and (B) as well?

MR. CIONGOLI: I -- I -- I certainly think the Court could take that approach, and -- and in fact I think to -- I think to -- I think it should. I think that the Court should find a way to read or construe 3742(a) to be constitutional, because it serves an important and independent policy choice that has been identified by Congress.

JUSTICE GINSBURG: But doesn't it conflict with 3553(a)(2), that is, the overriding provision that a sentence should be sufficient but not greater than necessary to deter criminal conduct. And the judge is looking at this defendant and says -- a criminal -- to deter criminal conduct and protect public against future crimes: "Well, this person has turned out to be a model citizen, and we don't have to keep him in for a longer time to protect the public against future crimes. So if I were to apply 3742(g)(2), I would give him a sentence that is unnecessary to protect the public against future crimes."

MR. CIONGOLI: Justice Ginsburg, I think you are pointing out that there is some tension which I have admitted. I think that again, this statute was drafted

at a time when there was a different set of assumptions, and so there may -- there may be applications which create some difficulty.

They create more difficulty in terms of how it is applied, but they are not the kinds of difficulties that I think are insurmountable. And they are certainly not the kinds of difficulties that support what I think is -- is a proposed broad solution by both the Petitioner and the government, that post Booker, sentencing statutes which -- which impose a mandatory guideline sentence really in any applications are facially unconstitutional.

I -- I don't read Booker that way, I don't think the Court intended it that way. Certainly the remedial holding in Booker doesn't indicate that. If it did -- if that is in fact what the remedial holding in Booker stands for, I think the -- the implications are more far reaching than the Court -- the Court intended. If there are no further questions?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Parish, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF ALFREDO PARRISH

ON BEHALF OF THE PETITIONER

MR. PARRISH: Thank you. I would like to first address the law of the case issue. Initially I

said it was apples and oranges, and it is. On two separate occasions after the 5 K ruling had been made by District Court Judge Bennett, it was appealed twice to the Eighth Circuit. After it was appealed twice to the Eighth Circuit, they had an abuse of discretion standard they could have used to resolve it. They did not comment on it. They upheld it.

Then it was sent back down. After it had come up on an original writ to this Court, this Court vacated the Eighth Circuit opinion, sent that opinion back down. But the law of the case, as you said, Mr. Chief Justice Roberts, still remained with the district court on the initial ruling. The initial ruling that Judge Bennett made with regard to the 5K departure was a separate ruling.

Now the Eighth Circuit in its own analysis of how you interpret its remand, we disagree with the government. They said they -- you look at the analysis of the case to determine the remand. And in that instance, we believe that the remand was the analysis of the case that the 5K departure remains. No new facts came in, no new controlling law came into place, and there was no manifest in justice. She heard no new facts on this case.

We believe the Court should reverse --

vacate the Eighth Circuit Court of opinion case regarding post-sentencing rehabilitation, remand with direction from this Court consistent with an opinion that requires the court to impose a sentence that does not exceed 24 months.

And, Justice Ginsburg, we did mention on page 33 of our brief, the 3742(g)(2) as a footnote, when the case first came up. But the Eighth Circuit, as you all know, did not use that rule. They used an old rule that was in effect from the Sims case to impose the sentence. It was not part of 3742(g)(2) or any other statute.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Ciongoli, you have briefed and argued this case as amicus curiae in support of the judgment below at the invitation of the court and have ably discharged your responsibility.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

**7**

**73** 25:21

**8**

**8** 17:23